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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FRED H. EDENFIELD, *et al.*,
Petitioners,

v.

SCOTT FANE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC., IN SUPPORT OF RESPONDENT

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CONSENT OF THE PARTIES

Petitioners, Fred H. Edenfield, et al., and Respondent, Scott Fane, have consented to the participation of the American Association of Attorney-Certified Public Accountants, Inc. in these proceedings, as amicus curiae in support of Respondent. Their consents have been filed with this Court.

INTEREST OF AMICUS CURIAE

The American Association of Attorney-Certified Public Accountants, Inc. ("AAA-CPA") is a not-for-profit corporation, formed in 1964 and now headquartered in

California, with members located all over the United States. Every member has been licensed as both an attorney and a certified public accountant ("CPA").

AAA-CPA is dedicated to ensuring that its members observe the highest professional and ethical standards in service to their clients and the public. At the same time, AAA-CPA supports the right of practitioners to disclose truthful information about ~~their~~ qualifications, and to engage in the practice of their professions.

AAA-CPA is active in advocating the rights of individuals, such as its members, who are dually licensed both as attorneys and as CPAs. AAA-CPA asserts the right of these individuals to hold themselves out as being licensed to practice both professions, and to engage in the practice of both, provided these individuals comply with the applicable standards of professional conduct.

AAA-CPA is in a unique position to appreciate the differences between the professional duties of attorneys on the one hand, and CPAs on the other. Because of these differences in professional duties, the state has a legitimate interest in regulating each profession by a distinctive set of standards, which are similar in some respects and different in others. Depending on the nature of the engagement, dual licensees must comply with one set of standards, or the other, or both. Dual licensees can discern and conform to the applicable set of standards, in much of the same way as attorneys engaged in the multistate practice of law can discern and conform to the standards of the applicable jurisdiction.

Although one set of standards governs attorneys and another set governs CPAs, a single pervasive principle applies with equal force to the regulation of each profession: the state should impose no restriction unless required by the public interest. When the regulation affects truthful speech, the state should impose restrictions only in narrowly-defined situations and only in

response to a demonstrated need to protect a substantial public interest.

The Florida rule at issue in this case imposes inappropriate restrictions on truthful speech. The rule is not required by the public interest, and clearly fails to withstand scrutiny under this Court's tests. AAA-CPA accordingly supports the position of Respondent, in seeking to uphold the judgment of the Eleventh Circuit declaring this rule unconstitutional.

SUMMARY OF ARGUMENT

I. The Florida rule, prohibiting CPAs from engaging in direct, uninvited, in-person solicitation, is not required by a substantial public interest. Its only demonstrable purposes are to maintain the etiquette of practitioners and to protect them from competition. It therefore violates the First Amendment.

II. Solicitation by CPAs, at issue in this case, is distinguishable from solicitation by attorneys. This Court can therefore invalidate the Florida rule which restricts solicitation by CPAs without considering prior cases involving solicitation by attorneys.

ARGUMENT

I. THE FLORIDA RULE IS NOT REQUIRED BY A SUBSTANTIAL PUBLIC INTEREST, AND THEREFORE VIOLATES THE FIRST AMENDMENT

Practitioners should be free to disclose truthful information about their qualifications, and to engage in the practice of their professions, without the state imposing unnecessary regulations. The state has a legitimate interest in establishing and enforcing standards of conduct, but these standards should impose no restrictions on truthful speech beyond those required by a demonstrated need to protect a substantial public interest. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), *Ohralik v.*

Ohio State Bar Ass'n., 436 U.S. 447 (1978), *Central Hudson Gas & Electric Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557 (1980), *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989).[1]

A. The Only Demonstrable Purposes of the Rule Are To Maintain Etiquette and Protect CPAs From Competition

The history of the rule against solicitation by Florida CPAs falls into three time periods: (1) 1905-1969; (2) 1969-1979; and (3) 1979 onwards. Each period starts with the enactment of a significant Florida statute. In summary, this history shows that the rule originated as an ethical standard of voluntary professional associations of CPAs, for the purpose of maintaining etiquette and protecting practitioners from competition. Decades later, the state conferred the force of law upon the rule. In doing so, the state did not demonstrate any purpose except to preserve the original purposes of the ethical standard. A rule serving these purposes cannot withstand First Amendment scrutiny.

1. *History, 1905-1969*

Florida enacted its first statute regulating the public accounting profession in 1905.[2] The original statute made

[1] Respondent's brief thoroughly analyzes these and other relevant cases. To avoid needless repetition, this amicus curiae brief does not restate the analysis or arguments contained in Respondent's brief.

[2] The history of Florida statutory law included here is based, in part, on "A Review of Chapter 473, Florida Statutes: Public Accountancy," prepared in September 1984 by staff of the Florida Senate Economic, Community, and Consumer Affairs Committee. Excerpts are set forth in an Appendix to this brief. *See also* Florida Institute of Certified Public Accountants, HISTORY OF THE FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS 1905-1962 (1963).

no mention of advertising or solicitation. The statute was amended a number of times, but it contained no mention of advertising or solicitation until 1969.

Ethical Codes of AICPA and FICPA

Any CPA who chose to become a member of the American Institute of Certified Public Accountants ("AICPA") undertook to comply with the AICPA Code of Ethics. The first version of the AICPA Code, adopted in 1917, prohibited CPAs from soliciting each others' clients. A revision in 1948 extended the prohibition, to prevent advertising and solicitation in general. *See* Report of the AICPA Special Committee on Solicitation (1981), Joint Appendix ("JA") 43-46.

The only sanction faced by violators of the AICPA Code was loss of membership in that organization. In 1923, partners in the CPA firm of Ernst & Ernst resigned their AICPA membership when the organization threatened to expel them for engaging in aggressive (and successful) advertising and solicitation. From then onwards, the AICPA "rigorously enforced" its rule. John L. Carey, THE RISE OF THE ACCOUNTING PROFESSION: FROM TECHNICIAN TO PROFESSIONAL 1896-1936, at 233-34 (1969).

The AICPA prohibition against solicitation was designed to serve two purposes: to maintain the etiquette of the profession, and to prevent CPAs from competing against one another.[3] An editorial in the 1927 Journal

[3] John L. Carey, THE RISE OF THE ACCOUNTING PROFESSION: FROM TECHNICIAN TO PROFESSIONAL 1896-1936 at 85, 88-90 (1969) notes that the AICPA's rules against advertising and solicitation reflect the influence of English and Scottish chartered accountants. Paul J. Miranti, Jr., ACCOUNTANCY COMES OF AGE: THE DEVELOPMENT OF AN AMERICAN PROFESSION, 1886-1940, at 77-78, 117-20 (1990) confirms this view, and adds that the AICPA rules against advertising and solicitation were, in part, an attempt to initiate the American Bar Association. *See also* Thomas D. Wood & Anne J. Sylvestre, *The History of Advertising by Accountants* 12 ACCOUNTING HIST. J., Fall 1985 at 59.

of Accountancy observed that practitioners had the legal right to solicit business, although this conduct would be a serious breach of etiquette. Editorial, 44 J. Acctcy., Nov. 1927, at 360.

Any Florida CPA who chose to become a member of the Florida Institute of Certified Public Accountants ("FICPA") undertook to comply with the FICPA Code, modeled on that of the AICPA.[4] The only sanction was loss of membership in FICPA.

Rules of State Board of Accountancy

Before enactment of the 1969 statute, the Florida Board of Accountancy adopted rules prohibiting CPAs from advertising or soliciting.[5] The Board evidently based these rules on its power, under statutes going back to 1905, to adopt rules regulating the practice of public accountancy.

Florida Supreme Court

The Florida Supreme Court invalidated parts of the Board's rules during this period. Although these decisions do not relate to solicitation, they indicate that the rules contained features which were held invalid because of their protectionist policy. The rule held invalid in *Florida Accountants Ass'n v. Dandelake*, 98 So.2d 323 (Fla. 1957) allowed only CPAs to hold themselves out as "accountants," while the rule held invalid in *Mercer*

[4] The FICPA added a set of Rules of Professional Conduct to its bylaws in 1956. Florida Institute of Certified Public Accountants, HISTORY OF THE FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS 1905-1963 (1963) at 51. The FICPA rule against solicitation was modified in the early 1980s, under the threat of antitrust litigation, Dooner affidavit, JA 20.

[5] Harry M. Turnburke, *An Ethics Examination for CPA Candidates*, 109 J. Acctcy, No. 4, Apr. 1960, at 70, 71 refers to a test on the rules of ethics of the Florida Board of Accountancy, including rules against solicitation. The author remarks: "One applicant frankly saw no harm in soliciting a client with whom there had been no prior connection of any kind."

v. Hemmings, 170 So.2d 33 (Fla. 1964) made it virtually impossible for out-of-state CPAs to qualify for Florida licenses.

2. History, 1969-79

The 1969 revision of the Public Accountancy Act included the state's first statutory prohibition against advertising or solicitation by CPAs. The prohibition was complete.[6] The ethical rules of the AICPA and FICPA remained in effect, and the Board's rules now had the support of express statutory authority. During the decade 1969-1979, the prohibition against solicitation was expressed simultaneously by statute, Board rules, and ethical rules of the AICPA and FICPA.

Events occurring between 1969 and 1979

The prohibition that appeared so firmly entrenched in 1969 was weakened by a number of events during the ensuing decade. First, this Court announced its decisions in *Bates* and *Ohralik*.

Second, the Federal Trade Commission and the Antitrust Division of the Justice Department placed pressure on the AICPA to repeal its rules against advertising and solicitation. JA 20-22. This pressure cast serious doubt on the ability of private organizations (such as AICPA and FICPA) to prevent CPAs from advertising or soliciting. If such prohibitions were to be in place, they could be imposed only by the state because the state was exempt from the antitrust laws. The state, however, was under constitutional constraints.

[6] Laws of Fla., ch. 69-36, Sec. 28, creating Fla. Stat. Sec. 473.29, provided that a CPA shall not:

> directly or indirectly solicit public accounting engagements to be performed in the state: (1) by means of circulars or advertisements or by unsolicited personal communication or interview or by any other means . . .

Third, the Florida legislature enacted the Regulatory Reform Act of 1976, establishing a system of "sunset" review of state statutes. This Act established an agenda of statutes to be reviewed, and included two expressions of legislative intent: first, that no profession would be subject to the state's regulatory power except to the extent necessary to protect the public from significant and discernible harm or damage; second, that the state would not regulate a profession in a manner which would unreasonably adversely affect the competitive market.[7]

3. *History, 1979 onward*

1979 Florida statute and rule

The legislature revised the accountancy statute substantially in 1979. The 1979 language remains in the current version of the statute.[8]

In 1979, shortly after enactment of this statute, the Board adopted Florida Administrative Code, Rule 21A-24.002, Solicitation.[9] This rule has remained unchanged

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[7] The sunset statute was originally enacted by Laws of Fla., ch. 76-168. It remains essentially the same, with minor stylistic changes, codified as Fla. Stat. Sec. 11.61.

[8] Laws of Fla. Ch. 79-202, creating Fla. Stat. Sec. 473.323(1)(*l*). It prohibits a CPA from

> (1) Engaging in direct, in-person, uninvited solicitation of a specific potential client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech as determined by the rules of the Board.

[9] Section 21A-24.002 provides, in material part:

> (2) A licensee shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services: . . . (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication.

Section 21A-24.002(3) defines the term "direct, in-person, uninvited solicitation," as used above, to mean:

> any communication which directly or implicitly requests an immediate oral response from the recipient.

The same subsection continues:

> Uninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited.

since then, except for a minor amendment not relevant to this case.

Withdrawal of AICPA and FICPA rules

The AICPA and FICPA withdrew their anti-solicitation rules in the early 1980s under threat of antitrust action by the Federal Trade Commission and the Antitrust Division. JA 20.

1979 statute, viewed as response to events of 1969-79

The 1979 statute appears to respond, to some extent, to each of the occurrences noted above. It responds to *Bates* by allowing advertising. It responds to *Ohralik* by preserving as much of the prohibition against solicitation as appeared at the time to be allowable under *Ohralik*, and by inserting the "except" clause to protect the statute against post-*Ohralik* developments. This clause guarantees that the statute itself will not run afoul of the free speech guarantees of the state and federal constitutions. The clause, however, leaves the Board's rules open to challenge on First Amendment grounds. This case presents such a challenge.

The 1979 statute can be viewed, moreover as a response to the antitrust proceedings against the AICPA. Recognizing that the Codes of the Ethics of AICPA and FICPA were vulnerable to attack on antitrust grounds, the legislature in 1979 gave the Board as much power as was constitutionally tolerable, to achieve by state action the policies which could no longer be achieved by the AICPA or FICPA.

The 1979 statute appears also to respond, to some extent, to the sunset law. By deregulating some practices which the 1969 Act had prohibited (such as advertising and indirect solicitation), the 1979 statute carries out part of the pro-competitive policy expressed in the sunset law. However, the 1979 statute fails to implement that policy completely. The pro-competitive policy expressed in general terms in the sunset law contrasts with the protectionist policy imposed by the anti-solicitation provision of the accountancy law. While this contrast reveals some legislative ambivalence, one point is clear: neither the sunset law nor the accountancy law reveals any purpose for the anti-solicitation rule, other than to maintain etiquette and to limit competition.

Legislative committee staff's recommendation to repeal statute in 1984

The 1979 anti-solicitation statute remains on the books, although the staff of a legislative committee recommended its repeal in 1984. The recommendation was contained in a report by the staff of the Florida Senate Economic, Community, and Consumer Affairs Committee, prepared for "sunset" review purposes.

The 1984 staff report concludes that the statutory provisions prohibiting solicitation are designed to protect practitioners from competition, in violation of the pro-competitive policy announced in the sunset law. (Excerpts of the staff report are set forth in the Appendix to this brief.) Notably, the staff report documents absolutely no situations in which solicitation by CPAs led to fraud, injury, or other impropriety. Despite the staff report and recommendation, the legislature reenacted the accountancy law in 1985 without significant change.

As indicated by the above history of the anti-solicitation rule, the only demonstrable purposes of the rule are to

maintain etiquette and limit competition. These purposes originated in the ethical rules of voluntary associations. They received the force of law much later, with no other demonstrable purpose.

B. The Evidence Refutes Petitioners' Assertion That the Purpose of the Rule Was To Protect the Integrity of the Attest Function

Petitioners assert that the purpose of the rule was to protect the integrity of the attest function. The evidence refutes this assertion in a number of ways.

First, the amicus curiae brief of the FICPA, in support of Petitioners, describes the purposes of the 1979 statute, using language which almost precisely tracks this Court's language in *Ohralik*. *See* FICPA br., at 6 (describing purposes of 1979 statute) and virtually identical language, id. at 8, summarizing *Ohralik*. This recitation reveals that the *strategic* purpose of the 1979 statute was to survive challenge under *Ohralik*, so as to preserve as much as possible of the *policy* purpose of the 1969 statute.

Second, the rule on its face applies to CPA solicitation for all types of engagements. If, however, Petitioners were correct in asserting that the rule was intended to protect the integrity of the attest function, the rule would have been written more narrowly, to apply only to attest engagements.

Third, and most remarkably, Petitioners have not placed a single piece of evidence in the record of this case to demonstrate that the rule now serves or ever has served any purpose other than those originally served by the ethical standards of the voluntary associations: preserving etiquette and protecting practitioners from competition. Independent research by AAA-CPA, in preparing this amicus curiae brief, has disclosed no evidence to demonstrate that the rule was ever intended to serve, or has ever served, any other purpose.

C. The Rule Does Not Pass First Amendment Scrutiny

Petitioners' brief repeatedly argues that the statute and rule are constitutionally authorized because of the state's interest in the "professionalism," "public image," or "prestige" of the public accounting profession. These terms are broad enough to include some matters in which the state has a substantial interest, and others in which it does not.

The state clearly has a substantial interest in assuring that candidates for the CPA license are appropriately qualified, that unauthorized persons do not hold themselves out as CPAs, and that CPAs perform their professional engagements with appropriate skill and honesty. These are essential components of professionalism. The anti-solicitation rule at issue in this case does not address any of these purposes. Each of the other actual or alleged purposes will next be considered.

1. *Etiquette*

This brief has indicated that one purpose of the anti-solicitation rule is to maintain the etiquette of the profession. Many practitioners continue to comply voluntarily with traditional standards of etiquette, as matters of personal preference, and many feel uncomfortable when they observe the decline in other practitioners' compliance with these standards.[10]

However, the state should not exercise its police power to enforce standards of professional etiquette. The state's interest in etiquette, if one exists at all, is not substantial

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[10] *See* George M. Dupuy, *The Direct Solicitation Issue*, 150 J. Accty, Oct. 1984, at 84; Herman J. Lowe, *Ethics in Our 100-Year History*, 163 J. Accty., May 1987, at 78. The survey of AICPA members, conducted for the Special Committee on Solicitation, shows agreement that "direct uninvited solicitation adversely affects the public image of CPAs . . . , is not in the public interest, will tend to lower CPA fees . . ." JA 58.

enough to justify state-imposed restraints on speech. *Bates*, 433 U.S. at 368-73; *Ohralik*, 436 U.S. at 460.

2. *Preventing competition*

This brief indicates that another purpose of the anti-solicitation rule is to protect CPAs from competition. It is clear from *Bates* and *Ohralik* that states may not prohibit speech for the purpose of preventing competition. According to these cases, the First Amendment guarantees the free flow of truthful commercial speech, except in the limited circumstances where *Ohralik* allows the state to restrain speech.

3. *Prophylactic measure to protect integrity of attest function*

Petitioners argue that the rule against solicitation is justified as a prophylactic measure to preserve the integrity of the attest function. Petitioners' argument is not convincing, for the following reasons. First, as discussed earlier in this brief, there is absolutely no indication this was the legislative purpose.

Second, even if the state did intend to protect the integrity of the attest function, the anti-solicitation rule is not designed to serve that purpose. Other means, more effective and appropriate than the anti-solicitation rule, are already in place to protect the integrity of the attest function. These measures include professional standards governing the performance of the engagement, malpractice suits, SEC discipline, and continuing professional education. Petitioners have failed to demonstrate that the anti-solicitation rule is needed or would even have any effect in protecting the integrity of the attest function.

In view of Petitioners' failure to demonstrate any justifiable purpose for the anti-solicitation rule, it does not pass constitutional muster under the level of scrutiny

required in First Amendment cases, or indeed under any other level of scrutiny.

II. SOLICITATION BY CERTIFIED PUBLIC ACCOUNTANTS IS DISTINGUISHABLE FROM SOLICITATION BY ATTORNEYS

In *Ohralik*, this Court allowed a state to discipline an ambulance-chasing attorney who solicited potential new clients. The present case is distinguishable, because the state regulation at issue here involves solicitation by CPAs, not by attorneys. Because the two professions are different, this Court can strike down the Florida rule against solicitation by CPAs without having to reconsider *Ohralik*.

Lawyers are licensed to litigate; CPAs are not. CPAs are licensed to express independent opinions based on objective audits of financial statements, and to confer on these opinions the credibility of the CPA profession; lawyers are not. This is the crux of the distinction between the two professions.

The license to practice law gives the lawyer the opportunity to inflict serious harm upon clients or others, for example by filing vexatious lawsuits, making abusive discovery requests, delaying settlement negotiations, neglecting a client's matter, or participating in the client's fraudulent conduct.

Proof of these improprieties is sometimes difficult to obtain, because many communications are oral and some are privileged. But if any of these improprieties can be proved, the lawyer is subject to discipline. Civil remedies are often available to the victim, but some types of abuses cause irreparable injury. The state therefore has a strong interest in taking prophylactic measures to prevent these abuses. If the state can demonstrate a pattern of irreparable injury resulting from the solicitation of business by attorneys, the state may be justified in regulating relevant types of solicitation.

The CPA license gives the practitioner the opportunity to inflict serious harm, but the harm is generally of a financial nature, affecting the client or third parties who rely on the CPA's audit. A CPA who solicits in the business setting deals with experienced and sophisticated potential clients, who are capable of evaluating the CPA's qualifications and proposed services. If an auditor commits misconduct, the facts can generally be proved by resort to the documentary record of the audit. The harm can generally be remedied adequately by money damages.

Despite these generalities about the harms most likely to result from improper audits, it is hypothetically possible that enforcement authorities could document a pattern of abuses by CPAs, resulting from the solicitation of clients, and causing irreparable harm. Upon such a demonstration, the state might be justified in regulating solicitation by CPAs.

In this case the state has made absolutely no attempt to present any such demonstration. Accordingly, the state has not shown that it has a substantial interest in regulating or prohibiting solicitation by CPAs.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the Eleventh Circuit, holding the Florida rule unconstitutional.

Respectfully submitted,

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September 14, 1992

APPENDIX

APPENDIX

Florida Senate, Staff of Economic,
Community, and Consumer Affairs Committee,
A Review of Chapter 473, Florida Statutes,
Public Accountancy (September 1984) (excerpts)

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[1] I. *Introduction*

The Regulatory Sunset Act, section 11.61, Florida Statutes, (ch. 81-318, L.O.F.) provides for a systematic repeal of those statutes which regulate initial entry into and practice of certain professions, occupations, businesses, and industries. Each year several statutes are scheduled for repeal unless revised or reenacted after an orderly review process. This review concerns chapter 473, Florida Statutes, which provides for state regulation of public accountancy. This chapter will be automatically repealed on October 1, 1985, unless reenacted by the Legislature.

The Regulatory Sunset Act sets forth specific criteria for the review of statutes scheduled for repeal. In essence, these criteria mandate a determination as to whether the law relating to public accountancy is a legitimate exercise of the state's police power. Stated another way, the primary question considered in this review is:

> Does the law relating to public accountancy protect the public from serious potential harm to such an extent that if chapter 473, Florida Statutes, was repealed, the public's health, safety, or welfare would be threatened?

If the answer is negative, staff must recommend the chapter be allowed to repeal. However, if the answer is positive, then the statute must be evaluated to determine whether it is tailored to address the potential for serious public harm at the least possible public cost.

• • • •

[6] 1. *History*

Chapter 5425, Laws of Florida, 1905, created the first Florida State Board of Accountancy. Any person who was over the age of 21 years, of good moral character, and a high school graduate was qualified to take the accountancy examination. Only persons who passed this examination could use the designation certified public accountant. The board could revoke a certificate for "unprofessional conduct of the holder of such certificate or for other sufficient cause." The law was substantially amended by chapter 12290, Laws of Florida, in 1927 when grounds for revocation or suspension of a certificate were expanded providing greater specificity. The board was authorized to promulgate canons of professional ethics, violation of which was grounds for suspension of a certificate.

[7] The board was also authorized to issue a "public accountant" certificate to any non-CPA who was practicing accountancy prior to 1928.

Chapter 15637, Laws of Florida, 1931, declared communications between accountants and their clients to be privileged, and it was made a misdemeanor for any person to violate any of 15 specified prohibitions. The law established eight grounds for the revocation or suspension of a certificate, one of which incorporated the 15 prohibitions mentioned above.

Chapter 17266, Laws of Florida, 1935, created a civil remedy which allowed the board to seek an injunction to prevent the violation of the laws relating to accountancy.

The method of funding the board was changed several times over the years. Originally, the board operated solely from the revenue it collected. In 1951 the expenses of the board were paid from, and surplus fees were paid to, the General Revenue Fund (chapter 26869, L.O.F.). In 1953 fees were deposited in, and expenses were paid from, a state agency's fund. A separate trust fund in the state treasury was created for the board in 1961.

All money collected by the board was deposited in that fund, and the board's expenses were payable solely from that fund. Ten percent of the revenue collected every year was to be transferred to the General Revenue Fund (ch. 61-514, L.O.F.).

Chapter 69-36, Laws of Florida, substantially revised the accountancy law. Applicants for the examination were required to be United States citizens domiciled in the state. [8] After passing the examination, applicants were required to complete a 1-year internship in the office of a Florida practitioner or an additional year of college course work in accounting. An ethics section was added to the examination. Contingent fees, competitive bidding, and solicitation of clients were prohibited.

Chapter 73-270, Laws of Florida, required practitioners to periodically reestablish their professional knowledge and competency by completing a continuing education program or passing a written examination.

Chapter 78-95, Laws of Florida, amended the disciplinary proceedings section to bring it into compliance with the provisions of chapter 120, Florida Statutes, relating to administrative hearings. Chapter 78-431, Laws of Florida, increased the size of every examining and licensing board within the DPR by one member. The new members were to be appointed by the Governor and were to be lay persons who were not and had not been members of the regulated profession or occupation or any closely related profession or occupation.

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[50] In the absence of state regulation, there would probably be a certain amount of voluntary self-regulation within the profession. The Florida Institute of CPAs (FICPA) and the American Institute of CPAs (AICPA) have adopted the AICPA Code of Ethics and each has procedures for processing complaints and discipling practitioners who violate the code's provisions. They are also

involved in the preparation and presentation of CPE programs and in programs to improve audit performance within the profession. Membership in these organizations is voluntary, however, and the most severe disciplinary action either can take is suspension or revocation of a practitioner's membership in the organization.

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[*Conclusions and Recommendations*]

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[62] The provisions of the act which prohibit competitive negotiation and solicitation of clients appear to be anti-competitive. It is generally assumed that excluding competition from a market removes a major incentive to deliver quality goods or services at the lowest possible price. If this assumption is true, prohibiting competitive negotiation for auditing engagements and solicitation of clients serves to increase the cost of accounting services.

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[63] 6. Are any facets of the regulatory process designed for the purpose of benefiting, and do they have as their primary effect the benefit of, the regulated entity?

Yes. A number of provisions of the Act may be seen as having as their primary effect, the benefit of the regulated entity.

The prohibition of competitive negotiation in section 473.317, Florida Statutes, appears to be designed primarily to benefit practitioners. It is unclear how permiting CPAs to competitively bid for auditing engagements would compromise the public health, safety, and welfare. CPAs would still be required by the statute to demonstrate their competency prior to becoming licensed, maintain their objectivity and independence, practice in conformance with accepted

standards of accounting and auditing, satisfy CPE requirements, refrain from engaging in prohibited acts, and abide by all the statutory provisions and board rules. The competitive negotiation prohibition does not appear to add any measure of protection for the public not already provided by the above-mentioned provisions.

The prohibition of client solicitation in section 473.323(1)(*b*), Florida Statutes, also appears designed [64] primarily to benefit practitioners. The public is protected by the statute from fraudulent, false, deceptive, or misleading advertising for goods or services (s. 473.323(1)(f), F.S.). In light of that provision, the client solicitation prohibition appears unnecessary for public protection purposes.

The grandfather clause and the provision providing for the licensure of all public accountants as CPAs, both in section 473.325, Florida Statutes, appear designed to benefit members of the profession.

Based upon these conclusions, and the other findings of this report, it is recommended:

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[65] That section 473.317, Florida Statutes, which prohibits competitive bidding for auditing engagements be deleted.

That section 473.323(1)(*b*), Florida Statutes, be amended to prohibit only solicitation of clients in a manner that is false, fraudulent, misleading, or deceptive.

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